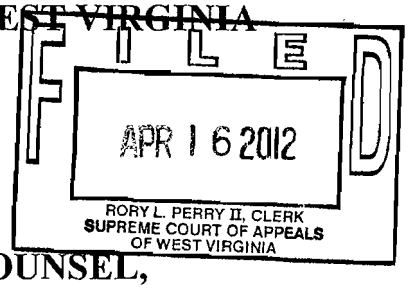
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 35705



OFFICE OF LAWYER DISCIPLINARY COUNSEL,
Complainant

vs.

JOHN W. ALDERMAN, III,
Respondent.

BRIEF OF RESPONDENT

Counsel for Complainant

Rachael L. Fletcher Cipoletti, Esq.
WV Bar No. 8806
Chief Lawyer Disciplinary Counsel
Office of Lawyer Disciplinary Counsel
2008 Kanawha Boulevard, East
Charleston, WV 25311
Telephone (304) 558-7999

Counsel for Respondent

Ancil G. Ramey, Esq.
WV Bar No. 3013
Steptoe & Johnson PLLC
P.O. Box 2195
Huntington, WV 25722-2195
Telephone (304) 526-8133

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I. STATEMENT OF THE CASE

This matter is being reviewed by the Court pursuant to a joint recommendation of the parties unanimously adopted by the Hearing Panel Subcommittee of the Lawyer Disciplinary Board.

The respondent, John W. Alderman, III ["Mr. Alderman"], was convicted by plea to two misdemeanors arising from his addiction first to prescription, then to non-prescription drugs, which resulted in a complaint by the Office of Lawyer Disciplinary Counsel ["ODC"]. Complainant's Brief at 2.

After Mr. Alderman's second arrest, he immediately advised the ODC and, after notice to the ODC, voluntarily withdrew from the practice of law to undergo an extensive in-patient and out-patient treatment program at the Cumberland Heights treatment facility near Nashville, Tennessee. Id. at 8-11.

Mr. Alderman did not engage in the practice of law from July 2009, when he sought treatment for his addiction at a treatment center in Williamsburg, Virginia,[1] until October 2010, when he resumed the practice of law, a period of fifteen months. Id. at 10.

During that fifteen-month period, Mr. Alderman first participated in a 90-day inpatient treatment program at Cumberland Heights. Id. at 9. Thereafter, he rented

[1] Prior to Mr. Alderman's first arrest, he unsuccessfully sought treatment for his prescription drug addiction at a detoxification center in Florida. Complainant's Brief at 6. After Mr. Alderman's first arrest, but before his second arrest, Mr. Alderman sought inpatient treatment at Thomas Memorial Hospital in Charleston, West Virginia. Id. at 7. Mr. Alderman testified that he spent over $70,000, which he funded through a home equity loan, for treatment at the various facilities in efforts to deal with his addictions to prescription and non-prescription drugs. Id. at 22.

an apartment in Nashville and participated in a 90-day outpatient program at Cumberland Heights. Id. Following his six-month stay at Cumberland Heights, Mr. Alderman continued to participate in treatment programs there, as well as actively participated in Alcoholics' Anonymous, Narcotics Anonymous, and other activities designed to both further his treatment and to assist others in dealing with their addictions. Id. at 10.

At the hearing in this matter, witness after witness, including lawyers in the recovery community, testified to Mr. Alderman's continued sobriety and active involvement in the addiction communities both in Nashville and Charleston. Id. at 11-14. Mr. Alderman's clients testified as to the quality of legal services provided to them following his assumption of the practice of law. Id. at 14-16. A member of local law enforcement testified as to Mr. Alderman's assistance with respect to problems of addiction in the officer's community. Id. at 15-16. Finally, Mr. Alderman's substance abuse counselor in Charleston testified regarding his successful sessions with Mr. Alderman and Mr. Alderman's active involvement with Alcoholics' Anonymous. Id. at 17.

Both Mr. Alderman and his wife testified regarding the history of alcoholism in Mr. Alderman's family; the health issues with respect to one of their children; and Mr. Alderman's medical condition, including surgery at Johns Hopkins in 1997 in an unsuccessful effort to treat that medical condition, that eventually evolved into a dependence first upon prescription drugs, then upon non-prescription drugs. Id. at 4-6, 18-19.

Mr. Alderman testified regarding his pleas to the misdemeanor offenses of possession and obstruction, for which he received unsupervised probation on short suspended sentences and fines totaling $50. Id. at 19, 22. Mr. Alderman has accepted full responsibility for his crimes; has made considerable efforts to recover from the addictions which resulted in his arrests; and has used his experience to assist others dealing with their own problems of addiction.

The ODC and Mr. Alderman's counsel cooperated during the entire process from Mr. Alderman's arrest through the disciplinary proceedings instituted as a result of Mr. Alderman's pleas to misdemeanor charges. Ultimately, they negotiated an agreed resolution that was adopted by the Hearing Panel Subcommittee as follows:

1. Based upon his pleas to two misdemeanor charges, Mr. Alderman should be suspended for a period of two years;

2. Mr. Alderman should receive credit for one year between October 2009 and October 2010 when he was actively in treatment; was not practicing law; and was fully compliant with his treatment.

3. Mr. Alderman's second year of suspension should be held in abeyance pending two years of conditional practice under the following conditions:

    a. Mr. Alderman's practice shall be supervised by a qualified attorney practicing law in Kanawha County who shall provide quarterly reports to the ODC regarding Mr. Alderman's compliance with the other terms and conditions of his supervised practice;

    b. Mr. Alderman shall attend AA or NA meetings on average of at least once daily for a period of two years, with monthly proof of attendance supplied, in writing, to his supervising attorney;

c. Mr. Alderman shall attend regular counseling sessions with his current counselor for a period of two years, with quarterly reports by his counselor to Mr. Alderman's supervising attorney;

d. Mr. Alderman shall participate as a volunteer and member of the Lawyers Assistance Committee for a total of 30 hours of service over a period of two years with quarterly reports by another member of the Committee to Mr. Alderman's supervising attorney;

e. Mr. Alderman shall be subject, at his own expense, to random drug screens upon two-hour notice by the ODC for a period of two years with reports of any results to Mr. Alderman's supervising attorney; and

f. Mr. Alderman should reimburse the ODC for its reasonable costs incurred in these proceedings.

4. Mr. Alderman will be subject to a one-year suspension if at anytime during his two years of supervised practice, he commits a substantial violation of these terms and conditions on his supervised practice.

Mr. Alderman respectfully submits that the foregoing discipline is consistent with the Rules of Professional Conduct; the decisions of this Court and other courts in similar circumstances; and the goals of punishment, deterrence, and protection of the public, and requests that they be adopted by this Court.

II. SUMMARY OF ARGUMENT

Based upon his pleas to two misdemeanor charges, Mr. Alderman has been determined to have violated Rules 8.4(d), 8.4(c), and 8.4(d) of the Rules of Professional Conduct, all of which involving general misconduct, but none of which involving breach of any duty to his clients or financial impropriety. Indeed, no client has ever filed a disciplinary complaint against Mr. Alderman and the instant proceedings were instituted

with Mr. Alderman's cooperation based upon his voluntary plea to two misdemeanor offenses. Accordingly, Mr. Alderman acknowledges that suitable punishment should be imposed consistent with the Rules of Professional Conduct.

Mr. Alderman also submits, however, that the conduct which resulted in these proceedings arose out of a long-term medical condition that unfortunately led to addictions first to prescription drugs and then to illegal drugs. Even before his first arrest, Mr. Alderman actively sought treatment for his addiction. After his first arrest, he sought treatment Williamsburg, Virginia, and Charleston, West Virginia.

Unfortunately, only after a relapse and his second arrest did Mr. Alderman finally receive the long-term treatment, at great expense to himself and his family, that has ultimately not only given him strength to deal with what will be a lifetime struggle against addiction, but has enabled him to help others, including other lawyers, in the recovery community.

Mr. Alderman wisely withdrew not only from his family, but from the practice of law, in order to get himself well after multiple attempts at treatment had failed. He submits that is not unreasonable to afford him credit for at least such portion of that voluntary withdrawal from the practice of law during which it is undisputed that he was actively involved in treatment and fully compliant with his program. Likewise, he submits that it is not unreasonable to hold in abeyance an additional year of suspension based upon the most rigorous terms of supervised conditional practice that the parties could collectively devise to not only assist Mr. Alderman in complying with his sobriety program, but fully protecting the public.

Consequently, Mr. Alderman requests that this Court adopted the recommendations of the Hearing Panel Subcommittee of the Lawyer Disciplinary Board and the Office of Disciplinary Counsel.

III. ARGUMENT

A. STANDARDS OF REVIEW

The standards of review of recommendations of the Lawyer Disciplinary Board are well-established.

"This Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law." Syl. pt. 3, Committee on Legal Ethics of the West Virginia State Bar v. Blair, 174 W. Va. 494, 327 S.E.2d 671 (1984).

"A de novo standard applies to a review of the adjudicatory record made before the [Lawyer Disciplinary Board] as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions; this Court gives respectful consideration to the [Board's] recommendations while ultimately exercising its own independent judgment. On the other hand, substantial deference is given to the [Board's] findings of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record." Syl pt. 3, Committee on Legal Ethics v. McCorkle, 192 W. Va. 286, 452 S.E.2d 377 (1994).

"Rule 3.16 of the West Virginia Rules of Lawyer Disciplinary Procedure enumerates factors to be considered in imposing sanctions and provides as follows: 'In imposing a sanction after a finding of lawyer misconduct, unless otherwise provided in

these rules, the [West Virginia Supreme Court of Appeals] or [Lawyer Disciplinary Board] shall consider the following factors: (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors.'" Syl. pt. 4, Office of Lawyer Disciplinary Counsel v. Jordan, 204 W. Va. 495, 513 S.E.2d 722 (1998).

"Mitigating factors in a lawyer disciplinary proceeding are any considerations or factors that may justify a reduction in the degree of discipline to be imposed." Syl. pt. 2, Lawyer Disciplinary Board v. Scott, 213 W. Va. 209, 579 S.E.2d 550 (2003).

"Aggravating factors in a lawyer disciplinary proceeding are any considerations or factors that may justify an increase in the degree of discipline to be imposed." Syl. pt. 4, Scott, supra.

"In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession." Syl. pt. 3, Committee on Legal Ethics v. Walker, 178 W. Va. 150, 358 S.E.2d 234 (1987).

In this matter, Mr. Alderman respectfully submits that (1) there is no dispute regarding the findings of fact upon which the Investigative Panel relied; (2) the

recommendations of the Panel as to discipline are well-supported and entitled to respect; (3) the relevant disciplinary factors favor the recommendations of the Panel; (4) mitigating factors fair outweigh the aggravating factors; and (5) a two-year suspension is sufficient to punish Mr. Alderman; to serve as an effective deterrent to other members of the Bar; and to restore public confidence in the ethical standards of the legal profession even if Mr. Alderman receives credit for one-year of self-imposed suspension during a period of intensive drug rehabilitation and his additional one-year suspension is held in abeyance pending a two-year period of supervised practice with extensive requirements regarding AA and/or NA attendance, drug counseling, random drug screening, and pro bono service as a member of the Lawyers Assistance Committee.

B. WITH RESPECT TO THE TWO MISDEMEANOR PLEAS WHICH ARE THE SUBJECT OF THIS PROCEEDING, MR. ALDERMAN VIOLATED NO DUTY TO ANY CLIENT AND ANY VIOLATION OF HIS DUTIES TO THE PUBLIC, THE LEGAL SYSTEM, OR THE PROFESSION WAS LIMITED TO HIS VIOLATION OF THE CRIMINAL LAWS OF THIS STATE.

Unlike a significant percentage of disciplinary matters which come before this Court,[2] this case involves no allegation of the violation of any duty to any client.

[2] See Lawyer Disciplinary Board v. Morgan, 228 W. Va. 114, 717 S.E.2d 898 (2011)(one-year suspension arising from four client complaints including the allegation of mishandling client funds); Lawyer Disciplinary Board v. Albright, 227 W. Va. 197, 706 S.E.2d 552 (2011)(one-year suspension arising from seven client complaints including accepting retainer fee and failing to provide services for which he was retained, failing to refund unused retainer fee, and failing to provide itemized accountings regarding retainers as requested by Office of Disciplinary Counsel); Lawyer Disciplinary Board v. Martin, 225 W. Va. 387, 693 S.E.2d 461 (2010)(six-month suspension for attorney's mishandling of estate as executor and failure to timely transfer file to newly-appointed executor of estate); Lawyer Disciplinary Board v. Chittum, 225 W. Va. 83, 689 S.E.2d 811 (2010)(public reprimand for attorney's use of flirtatious overtures; commingling of personal funds with client funds; and closure of interest lawyer trust account); Lawyer Disciplinary Board v. King, 221 W. Va. 66, 650 S.E.2d 165

Indeed, no client has ever complained about Mr. Alderman and all of the clients who testified in this matter praised his responsiveness and legal ability.

Moreover, any violation of Mr. Alderman's duties to the public, the legal system,[3] or the profession arise solely from his failure to conform his conduct to the

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(2005)(60-day suspension for attorney who entered into a loan transaction with his client); Lawyer Disciplinary Board v. Simmons, 219 W. Va. 223, 632 S.E.2d 909 (2006)(20-day suspension for attorney for failing to keep his clients reasonably informed about the status of their legal matters, failing to appear in court, and failing to exercise reasonable diligence and promptness in representing his clients violated the rules of professional conduct that require a lawyer to act with reasonable diligence and promptness when representing a client, keep his client reasonably informed about the status of a matter and promptly comply with reasonable requests for information, and explain a matter to the extent necessary to permit the client to make informed decisions).

[3] This is not a case, for example, like Lawyer Disciplinary Board v. Smoot, 228 W. Va. 1, 716 S.E.2d 491 (2010), where an attorney was suspended for a period of one year for providing pro se claimant with report of a medical examination prepared on behalf of the employer after removing narrative portion of report in which physician diagnosed claimant with complicated pneumoconiosis which this Court determined constituted dishonesty, fraud, deceit, or misrepresentation and prohibiting conduct that is prejudicial to the administration of justice. See also Lawyer Disciplinary Board v. Stanton, 225 W. Va. 1, 695 S.E.2d 901 (2010)(annulment where attorney deliberately misrepresented to corrections officials that he represented an inmate in order engage in sexual relations with the inmate); State ex rel. Office of Disciplinary Counsel v. Albright, 225 W. Va. 105, 690 S.E.2d 113 (2009)(indefinite suspension imposed on attorney who failed to comply with this Court's disciplinary order); State ex rel. Office of Disciplinary Counsel v. Barnabei, 224 W. Va. 642, 687 S.E.2d 580 (2009)(indefinite suspension imposed on attorney who failed to comply with this Court's disciplinary order); State ex rel. Office of Disciplinary Counsel v. Mooney, 223 W. Va. 563, 678 S.E.2d 296 (2009)(indefinite suspension imposed on attorney who failed to comply with this Court's disciplinary order); Office of Disciplinary Counsel v. Niggemyer, 221 W. Va. 59, 650 S.E.2d 158 (2007)(indefinite suspension imposed on attorney who failed to comply with this Court's disciplinary order); Lawyer Disciplinary Board v. Losch, 219 W. Va. 316, 633 S.E.2d 261 (2006)(public reprimand imposed for attorney's alteration of suggestion obtained from circuit court following default judgment); Lawyer Disciplinary Bd. v. Hardin, 217 W. Va. 659, 619 S.E.2d 172 (2005)(two-year suspension for attorney who did not act with diligence in responding to discovery requests, failed to make reasonable efforts to expedite litigation, knowingly disobeyed trial court's orders, failed to make reasonably diligent effort to comply with discovery requests, and acted in a way prejudicial to administration of justice by not appearing for at least seven hearings); Committee on Legal Ethics v. Hobbs, 190 W. Va. 606, 439 S.E.2d 629 (1992)(two-year suspension for attorney who made extortion to payment to tria judge and did not report the extortion for many years); Committee on Legal Ethics v. Wilson, 185 W. Va. 598, 408 S.E.2d 350 (1991)(annulment for

criminal laws of this state, which resulted in his voluntary guilty pleas to misdemeanor charges, and the imposition of suspended sentences, unsupervised probation, and small fines.

Unlike in some cases,[4] there have been no complaints regarding Mr. Alderman after his second arrest which occurred nearly three years ago and Mr. Alderman has fully cooperated with the Office of Lawyer Disciplinary Counsel.

C. THERE IS NO ALLEGATION THAT MR. ALDERMAN INTENTIONALLY, KNOWINGLY, OR NEGLIGENTLY ENGAGED IN UNETHICAL CONDUCT OTHER THAN ARISING FROM HIS PLEAS TO TWO MISDEMEANOR CHARGES.

Certainly, lawyers are held to a higher standard with respect to criminal conduct. Obviously, Mr. Alderman knew that his possession of illegal drugs was unlawful and violated the Rules of Professional Conduct. Moreover, he knew that failing to cooperate in a traffic stop was unlawful and violated the Rules of Professional Conduct. On the other hand, this is not a case where Mr. Alderman intentionally, knowingly, or negligently engaged in unethical conduct separate and apart from his addiction.

For example, this is not a case like Lawyer Disciplinary Board v. Cavendish, 226 W. Va. 327, 700 S.E.2d 779 (2010), where this Court suspended an attorney for three years after he received payments in excess of $60,000.00 from

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attorney who was convicted of multiple felonies for obtaining workers' compensation payments under false pretenses).

[4] See Lawyer Disciplinary Board v. Grafton, 227 W. Va. 579, 712 S.E.2d 488 (2011)(two-year suspension due to attorney's further, related misconduct following filing of recommended sanctions).

company that advances fees to court-appointed attorneys by misrepresenting the amount due him and for work he performed for privately retained clients or on behalf of a former employer, and when he received the funds due his former employer, he commingled the funds with his personal property and converted them to his own use.[5]

This is also not a case like In re McMillian's Eligibility For Conditional Admission To The Practice Of Law, 217 W. Va. 277, 617 S.E.2d 824 (2005), where this Court admitted a convicted felon to the practice of law even though the applicant, a former law enforcement officer who had been fired for taking an unauthorized person with him to Florida to retrieve a prisoner, had engaged in illegal wiretapping for compensation in conjunction with the divorce proceedings of his client.

Rather, this is a case where Mr. Alderman became addicted first to prescription medication for which he unsuccessfully sought treatment and then to illegal drugs which resulted in his arrests and pleas.

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[5] See also Lawyer Disciplinary Board v. Barton, 225 W. Va. 111, 690 S.E.2d 119 (2010)(annulment for attorney's conversion of personal injury settlement proceeds owed to medical providers and providing client's estate with fraudulent accounting of settlement proceeds); Lawyer Disciplinary Board v. Brown, 223 W. Va. 554, 678 S.E.2d 60 (2009)(annulment where attorney converted $8,000 in a client trust account to his own use); Lawyer Disciplinary Board v. Coleman, 219 W. Va. 790, 639 S.E.2d 882 (2006)(annulment where attorney diverted and converted approximately $170,000 in legal fees paid by clients to attorney's law firm); Lawyer Disciplinary Board v. Ball, 219 W. Va. 296, 633 S.E.2d 241 (2006)(annulment where attorney drafted a will providing for excessive fees and otherwise engaged in a pattern of misconduct); Lawyer Disciplinary Board v. McCorkle, 219 W. Va. 245, 633 S.E.2d 1 (2006)(annulment where attorney submitted fraudulent checks to Office of Disciplinary Counsel investigating complaints and used client trust funds to pay attorney's rent and loan $15,000 to a friend); Committee on Legal Ethics v. Gorrell, 185 W. Va. 419, 407 S.E.2d 923 (1991)(annulment for attorney convicted of eleven counts of mail fraud in connection with scheme to siphon money from law partnership); Committee on Legal Ethics v. Six, 181 W. Va. 52, 380 S.E.2d 219 (1989)(annulment for attorney convicted of felony counts of embezzling client funds and breaking and entering).

D. THE CONDUCT INVOLVED IN THIS CASE HARMED ONLY MR. ALDERMAN AND HIS FAMILY, BUT RESULTED IN NO HARM TO THE PUBLIC OR HIS CLIENTS.

With respect to "the amount of the actual or potential injury caused by the lawyer's misconduct," the third factor to be weighed in imposing attorney discipline, "the only actual injury," as noted by the ODC in its brief, "caused by Respondent's conduct was to himself, his family and the public's perception of lawyers." Brief at 25.

Again, prior to his first arrest, Mr. Alderman sought treatment for his addiction to prescription medication, which was neither a crime nor a violation of the Rules of Professional Conduct. Unfortunately, that treatment was so unsuccessful, it resulted in a subsequent addiction to illegal drugs.

Immediately upon his first arrest, Mr. Alderman again sought treatment, participating in a thirty-day inpatient rehabilitation program in Virginia. Unfortunately, that treatment was also unsuccessful and he quickly suffered a relapse resulting in a second arrest.

It was only after his second arrest; short period of incarceration; and extensive rehabilitative effort, including a period of a year in inpatient and outpatient treatment in Tennesee, and active participating in Alcholics' Anonymous, Narcotics' Anonymous, and drug counseling that Mr. Alderman has been able to return to a normal and productive life.

Certainly, it is appropriate to consider the public perception of attorneys who are convicted of misdemeanor drug offenses, but Mr. Alderman submits that it is also appropriate to consider all of the facts and circumstances that culiminated in his

addictive behavior; to consider how he has accepted full responsibility for his actions; to consider how no client was harmed or financial impropriety occurred; to consider the extraordinary efforts both in time and money he has expended, both before and after his arrests, in order to address his addiction; to consider the impact on his family both as a consequence of his long and difficult road to recovery and of his inability to provide for them if he is suspended from the practice of law; and to consider how far he has come in his rehabilitation efforts to assisting local law enforcement, the families of persons fighting addiction, and those suffering from addiction.

E. THE MITIGATING FACTORS IN THIS CASE FAR OUTWEIGH ANY AGGRAVATING FACTORS.

In Syllabus Point 3 of Scott, this Court observed:

> Mitigating factors which may be considered in determining the appropriate sanction to be imposed against a lawyer for violating the Rules of Professional Conduct include: (1) absence of a prior disciplinary record; (2) absence of a dishonest or selfish motive; (3) personal or emotional problems; (4) timely good faith effort to make restitution or to rectify consequences of misconduct; (5) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (6) inexperience in the practice of law; (7) character or reputation; (8) physical or mental disability or impairment; (9) delay in disciplinary proceedings; (10) interim rehabilitation; (11) imposition of other penalties or sanctions; (12) remorse; and (13) remoteness of prior offenses.

By contrast, in Syllabus Point 4 of Scott, this Court observed, "Aggravating factors in a lawyer disciplinary proceeding are any considerations or factors that may justify an increase in the degree of discipline to be imposed."

In Syllabus Point 3 of Lawyer Disciplinary Board v. Dues, 218 W. Va. 104, 624 S.E.2d 125 (2005), this Court set forth the following test for when a mental impairment should be considered mitigating:

> In a lawyer disciplinary proceeding, a mental disability is considered mitigating when: (1) there is medical evidence that the attorney is affected by a mental disability; (2) the mental disability caused the misconduct; (3) the attorney's recovery from the mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.

In Dues, this Court imposed only a public reprimand and restriction to work as a mental hygiene commission for two years even though (1) the proceedings involved nine separate complaints by the attorney's clients and two by the Office of Disciplinary Counsel; (2) the attorney did not contest 39 separate violations of the Rules of Professional Conduct; (3) the attorney failed to perform legal services for which clients had paid him fees, including the failure to file an appeal; (4) some of the suits filed by the attorney were dismissed for failure to prosecute; (5) the attorney failed to return unearned retainers; and (6) the attorney failed to cooperate in the investigation of the Office of Disciplinary Counsel. 218 W. Va. at 106-110, 624 S.E.2d at 127-131.

Against this backdrop, this Court nevertheless rejected the recommendation of an 18-month suspension, stating as follows:

> Mr. Dues was admitted to the practice of law in this state in 1978. From that time up until the complaints in the instant matter, this Court has never imposed a sanction against him for misconduct involving a client. The one instance, in 1992, in which this Court was called upon to reprimand Mr. Dues, the matter did not involve a client. In other words, from 1978

> until approximately 2002, Mr. Dues was an outstanding lawyer for the public. It was only after Mr. Dues sustained a heart attack, triple bypass surgery and a prostrate operation that he began to falter in his duties and responsibilities as an attorney.

Id. at 112, 624 S.E.2d at 133.

Although his case involves no allegations of client neglect, misrepresentation, mishandling or misuse of client funds, or lack of cooperation in the investigation of the Office of Disciplinary Counsel, Mr. Alderman respectfully submits that this case is similar in the sense that (1) the evidence is clear that he suffered from a long-standing medical condition; (2) he eventually became addicted to prescription medications as a result of the attempted treatment of that condition; (3) he sought to address that addiction through a detoxification program prior to his first arrest; (4) that effort failed and he eventually became addicted to illegal drugs; (5) he sought drug treatment following his first arrest; (6) that effort failed and he was arrested a second time; (7) he was then treated both on an inpatient and outpatient basis for a period of six months and continued with treatment for another six months thereafter; (8) his recovery from addiction is demonstrated by a meaningful and sustained period of successful rehabilitation since September 2009; and (9) with continued adherence to his plan of sobriety, the recurrence of any misconduct as a result of his addiction is unlikely.[6]

[6] Moreover, this is not a case like Lawyer Disciplinary Board v. Cavendish, 226 W. Va. 327, 700 S.E.2d 779 (2010), where the record was insufficient regarding presence of the Dues mitigating factors.

Mr. Alderman acknowledges that this Court has distinguished between the abuse legal substances, such as alcohol, addressed in Lawyer Disciplinary Board v. Hardison, 205 W. Va. 344, 518 S.E.2d 101 (1999), from the use of illegal substances, such as cocaine, addressed in Lawyer Disciplinary Board v. Brown, 223 W. Va. 554, 678 S.E.2d 60 (2009), but Brown involved a case where illegal drug addiction was offered as an excuse for the theft of client funds.[7]

Here, as noted, there is no allegation of any financial improprieties or even client neglect. As this Court noted in Brown, 223 W. Va. at 561, 678 S.E.2d at 67, "Although this Court does not absolutely preclude addiction to illegal drugs as a consideration and while Mr. Brown's actions may have stemmed in part from his cocaine addiction, we simply cannot condone his behavior and cannot accept the Board's recommendation. There is never a valid excuse for stealing client trust funds."[8]

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[7] See also Lawyer Disciplinary Board v. Duty, 222 W. Va. 758, 671 S.E.2d 763 (2008)(attorney's Oxycontin addiction insufficiently mitigating where he did not seek treatment until after receipt of formal changes and where attorney was charged with failing to inform one client of the status of his personal injury claim until three days before expiration of the statute of limitations at which time he informed his client that he would not file the suit without receipt of the filing fee; improperly sharing a fee with a non-lawyer employee; making an improper claim to withhold $3,500 in expenses from a client's settlement; improperly holding and using client funds; and failing to cooperate with the Office of Disciplinary Counsel).

[8] Moreover, Justice Ketchum observed in his dissent as follows: "Sometimes we need to mix a little mercy with justice. This lawyer misappropriated his client's funds to support his drug problem. He has since sought treatment and has straightened up his life. An indefinite suspension with the right to petition the Court for reinstatement in three years provides plenty of protection to the public." 223 W. Va. at 562, 678 S.E.2d at 68.

Moreover, unlike many respondents,[9] Mr. Alderman has fully complied with every aspect of the investigation conducted by the Office of Disciplinary Counsel.

F. THE RECOMMENDED DISCIPLINE IS SIMILAR TO THAT IMPOSED BY THIS COURT AND OTHER COURTS IN SIMILAR CIRCUMSTANCES.

This Court has used supervised practice in conjunction with the imposition of discipline in other cases.

In Lawyer Disciplinary Bd. v. Roberts, 217 W. Va. 189, 617 S.E.2d 539 (2005), for example, as in this case, the Lawyer Disciplinary Board recommended a public reprimand and supervised practice of two years and psychological counseling in conjunction with an agreement between the Office of Disciplinary Counsel and the attorney arising from the attorney's multiple acts of misconduct in representing a client in post-divorce proceedings. The public reprimand, supervised practice, and psychological counseling arose from the following facts:

> Ms. Roberts has practiced law since 1977 and had not received any prior discipline from the Lawyer Disciplinary Board of this Court. Additionally, it was demonstrated that she was suffering from both physical and psychological stress due to certain personal situations, and that this condition was a contributing cause of her actions. Specifically, Ms. Roberts had a series of five surgeries during a period of years on her back and neck leaving her with pain

[9] In Lawyer Disciplinary Board v. Wade, 217 W. Va. 58, 65, 614 S.E.2d 705, 712 (2005), for example, this Court annulled an attorney's license where he repeatedy failed to cooperate in the investigation of four client complaints stating, "Based on the severity of Mr. Wade's misconduct and his lack of interest in the disciplinary proceedings against him, as well as the financial and emotional impact his actions have had on his clients, the only adequate discipline that would serve the public policy interests is annulment of Mr. Wade's law license." Here, of course, none of these factors are present.

> and discomfort and chronic pain syndrome creating a physical and emotional impact on her ability to practice law. Ms. Roberts also sought treatment from psychologists at West Virginia University and Nashville, Tennessee to enable her to better deal with stress, chronic pain, and other related effects. During this same period, Ms. Roberts had additional stress due to the termination of her marriage and her responsibilities at her law office. Moreover, subsequent to the filing of the Statement of Charges, on November 4, 2003, Ms. Roberts voluntarily agreed to an eight to nine week absence from her law office for the purpose of medical treatment and rehabilitation which included pain clinic evaluation and review by physicians in physical medicine and rehabilitation. She also had a series of lumbar and cervical epidermal injections to ease her pain helping her to focus on the practice of law and to allow an appropriate response to her clients' needs and demands.

Id. at 195, 617 S.E.2d at 545.

These circumstances are not entirely dissimilar from the instant proceeding where Mr. Alderman suffered from a long-standing medical condition which required surgery and pain management, ultimately leading to a dependence on prescription medication and treatment at a detoxification facility prior to his first arrest, and a later addiction to illegal drugs which resulted in rehabilitation efforts at facilities in Virginia and Tennessee.

Accordingly, as in other cases,[10] Mr. Alderman submits that the use of supervised practice in this disciplinary proceeding is appropriate.

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[10] This Court has imposed supervised practice in conjuction with disciplinary proceedings in Lawyer Disciplinary Bd. v. Morgan, 228 W. Va. 114, 717 S.E.2d 898 (2011)(two years' supervised practice); Lawyer Disciplinary Bd. v. Albright, 227 W. Va. 197, 706 S.E.2d 552 (2011)(two years' supervised practice); Lawyer Disciplinary Bd. v. Cavendish, 226 W. Va. 327,

This Court has imposed psychiatric and/or psychological counseling, or participation in substance abuse programs, in conjunction with disciplinary proceedings.

In Lawyer Disciplinary Bd. v. Grafton, 227 W. Va. 579, 712 S.E.2d 488 (2011), for example, where the attorney had sustained severe injuries including the loss of a foot in an automobile accident and eventually deteriorated to the point that a trustee had to be appointed to assume control of his client files, this Court ordered both a two-year period of supervision upon his resumption of the practice of law; a psychiatric/psychological evaluation; and compliance with any treatment protocol recommended by the evaluating psychiatrist/psychologist.[11]

In Lawyer Disciplinary Bd. v. Duty, 222 W. Va. 758, 766, 671 S.E.2d 763, 772 (2008), similarly, where the attorney's misconduct was related to his addiction to OxyContin, this Court ordered both a two-year period of supervision upon his resumption

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700 S.E.2d 779 (2010)(one year's supervised practice); Lawyer Disciplinary Bd. v. Martin, 225 W. Va. 387, 693 S.E.2d 461 (2010)(one year's supervised practice); Lawyer Disciplinary Bd. v. Chittum, 225 W. Va. 83, 689 S.E.2d 811 (2010)(two years' supervised practice); Lawyer Disciplinary Bd. v. Barton, 225 W. Va. 111, 690 S.E.2d 119 (2010)(two years' supervised practice); Lawyer Disciplinary Bd. v. Brown, 223 W. Va. 554, 678 S.E.2d 60 (2009)(two years' supervised practice); Lawyer Disciplinary Bd. v. Duty, 222 W. Va. 758, 766, 671 S.E.2d 763, 772 (2008)(two years' supervised practice); Lawyer Disciplinary Bd. v. Keenan, 208 W. Va. 645, 542 S.E.2d 466 (2000)(two and one-half years' supervised practice); Lawyer Disciplinary Bd. v. Hardison, 205 W. Va. 344, 518 S.E.2d 101 (1999)(one year's supervised practice); Office of Lawyer Disciplinary Counsel v. Galford, 202 W. Va. 587, 505 S.E.2d 650 (1998)(one year's supervised practice); Lawyer Disciplinary Bd. v. Vieweg, 194 W. Va. 554, 461 S.E.2d 60 (1995)(five years' supervised practice).

[11] See also Albright, supra (psychiatric/psychological evaluation and compliance with any treatment protocol); Cavendish, supra (psychiatric/psychological evaluation); Brown, supra (psychiatric/psychological evaluation and compliance with any treatment protocol).

of the practice of law and that he "be required to participate in an alcoholics anonymous or narcotics anonymous program approved by the Office of Disciplinary Counsel."[12]

This Court has imposed periods of suspension of similar duration in cases involving misdemeanor convictions.[13]

In Committee on Legal Ethics v. Taylor, 187 W. Va. 39, 415 S.E.2d 280 (1992), this Court publicly reprimanded an attorney for the misdemeanor offense of writing worthles checks.

In Office of Lawyer Disciplinary Counsel v. Albers, 214 W. Va. 11, 585 S.E.2d 11 (2003), this Court reinstated an attorney after a suspension of only five months in conjunction with her plea of no contest to misdemeanor charges of assault, petty larceny, harassing telephone calls, and violating a protective order, and a sentence of one-year in jail suspended pending five years' probation.

In Committee on Legal Ethics of W. Va. State Bar v. Higinbotham, 176 W. Va. 186, 342 S.E.2d 152 (1986), this Court suspended an attorney for only six months following a misdemeanor conviction of willful failure to file federal income tax returns

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[12] See also Keenan, supra at 653, 542 S.E.2d at 474 ("Keenan shall participate in Alcoholics Anonymous or other similar program"); Hardison, supra at 352, 518 S.E.2d at 109 ("Mr. Hardison will continue counseling and participation in Alcoholics Anonymous as directed by his physician(s)."); Vieweg, supra at 560, 461 S.E.2d at 66 ("Mr. Vieweg shall continue his rehabilitation program with Alcoholics Anonymous.").

[13] Even where felony convictions have been involved, this Court has imposed suspensions not far exceeding two years. See Committee on Legal Ethics of the West Virginia State Bar v. Boettner, 188 W. Va. 1, 422 S.E.2d 478 (1992)(three-year suspension for attorney convicted of felony of willfully evading payment of federal income taxes by failing to report other persons' payment of interest on attorney's bank loan);

for nine consecutive years and sentence to one year in prison of which he served five months and was placed on five years' probation.

Similarly, in Committee on Legal Ethics of West Virginia State Bar v. Scherr, 149 W. Va. 721, 143 S.E.2d 141 (1965), this Court imposed a suspension of only one-month following an attorney's conviction of failure to file federal income tax returns.

In Office of Lawyer Disciplinary Counsel v. Galford, 202 W. Va. 587, 505 S.E.2d 650 (1998), this Court imposed a suspension of one year for an attorney convicted of conspiracy to commit a misdemeanor arising from the suggested forgery of a will.

Even for attorneys convicted of misdemeanor drug offenses who were public officials held to a higher standard, this Court has not imposed periods of suspension far exceeding the two years recommended in this case.

In Committee on Legal Ethics of the West Virginia State Bar v. White, 189 W. Va. 135, 428 S.E.2d 556 (1993), for example, held that a prosecutor's convictions of three misdemeanors related to the possession of cocaine, marijuana, and percocet warranted two-year suspension from practice of law.[14] Moreover, as is recommended in this case, this Court permitted that suspension to apply retroactively to the date upon which the attorney voluntarily ceased the practice of law to participate in a program of rehabilitation:

[14] See also Committee on Legal Ethics v. Roark, 181 W. Va. 260, 382 S.E.2d 313 (1989)(three-year suspension arising from guilty plea, after vigorous public denials, to six of thirty-count federal indictment by Charleston Mayor to drug charges resulting in six-month sentence and three years' probation).

> In considering the appropriate disciplinary action to be taken against Mr. White, we must balance the seriousness of his unethical and illegal conduct while holding public office with his cooperation with both the federal authorities and the Committee and his contrition and acknowledgement of his wrongdoing. We believe the two-year suspension, retroactive to January 2, 1992 (the date Mr. White voluntarily placed himself on inactive status with the State Bar), recommended by the Committee, appropriately accounts for both the seriousness of Mr. White's crimes while he occupied a position of public trust, and the mitigating facts and circumstances of his later behavior.

Id. at 139, 428 S.E.2d at 560.

Here, of course, Mr. Alderman is not receiving the benefit of the entire 15-month period in which he did not engage in the practice of law, but rather only the 12-month period after his second arrest and upon entry into the rehabilitation program at Cumberland Heights.

In cases involving misdemeanor drug convictions[15] of private attorneys, this Court has imposed periods of suspension far less than two years and has allowed credit for time in which the attorneys voluntarily withdrew from the practice of law.

In Committee on Legal Ethics v. Harman, 179 W.Va. 298, 367 S.E.2d 767 (1988), an attorney delivered marijuana to her client who was incarcerated in the county jail for which she pleaded guilty to the misdemeanor of conspiring to possess marijuana, was fined $500, and placed on one year probation. Thereafter, she voluntarily withdrew

[15] Although Mr. Alderman acknowledges the difference between the abuse of a legal substance, such as alcohol or prescription drugs, and the abuse of illegal drugs, other jurisdictions have imposed relatively short periods of suspension for the abuse of alcohol or prescription drugs, even where resulting in more serious convictions. See In re Disciplinary Proceedings Against Brandt, 338 Wis. 2d 524, 808 N.W.2d 687 (2012)(four-month suspension for felony drunk driving conviction).

from the practice of law for over one year. She successfully completed her probation period and the Committee, in view of these facts, requested only that she be given a public reprimand. This Court agreed stating as follows:

> In the aftermath of these circumstances, the respondent voluntarily removed herself from the practice of law for a year or more. During this period, the respondent returned to her parent's home in Pendleton County where she worked on their farm and became involved in certain charitable activities. The respondent has recently resumed a law practice in Franklin, and the record suggests she is in good standing with the Bench and Bar in that area. The record would also suggest that the respondent is more than contrite about her misconduct and regrets the nature of her misdeeds.
>
> We believe that while the respondent has taken serious steps to improve her professional judgment, the foregoing facts show professional misconduct warranting a public reprimand. Furthermore, in addition to being publicly reprimanded, we believe the respondent should pay the costs of this proceeding. Costs have been assessed in similar cases in the past. See, Committee on Legal Ethics v. White, 176 W. Va. 753, 349 S.E.2d 919 (1986).
>
> We conclude that the respondent's actions with her client involve a serious violation of the Code of Professional Responsibility. We defer to the committee's recommendation that respondent need not be suspended or disbarred and agree to the Committee's recommendation of a public reprimand as the appropriate sanction. The respondent is also ordered to reimburse the Committee for the actual and necessary expenses incurred by it in connection with this proceeding.

Id. at 299-300, 367 S.E.2d at 768-769.

Mr. Alderman respectfully submits that if Ms. Harman received only a public reprimand based upon a misdemeanor conviction of delivering marijuana to an incarcerated client after a period of about one year of voluntarily removing herself from

the practice of law, the recommendation that he be suspended for two years, with one year credit for a period during which he was actively in treatment and one year held in abeyance pending rigorous supervised practice is reasonable and should be adopted by this Court.

The discipline recommended in this case is also consistent with that imposed in other jurisdictions in similar cases.

In re Piken, 86 A.D.3d 143, 924 N.Y.S.2d 527 (2011), the court imposed only public censure against attorney who had been convicted of crime of resisting arrest, and misdemeanors of aggravated driving while intoxicated, failing to obey an officer regulating traffic, and speeding. As in this case, the attorney's conduct was the product of chemical dependency, but following his arrest, the attorney sought and successfully obtained treatment, causing the court to note:

> In view of the mitigation advanced, including the absence of a prior disciplinary history, the steps taken by the respondent to rehabilitate himself since these incidents, including voluntary admission to various in-patient programs, compliance with the conditions of his probation, and the fact that the respondent has maintained his sobriety and no third party was affected by his conduct, we conclude that a public censure is the appropriate discipline to impose in this case

Id. at 146, 924 N.Y.S.2d at 529.[16]

[16] See also Iowa Supreme Court Attorney Disciplinary Bd. v. Keele, 795 N.W.2d 507, 514 (Iowa 2011)(court imposed no discipline on a lawyer who was convicted of the illegal possession of a firearm while addicted to a controlled substance stating that, "Keele's illegal possession of a firearm has not affected the professional relationships he has with his clients, fellow lawyers, or judges. This criminal conduct has not called into question his ability to competently and vigorously represent clients in important controversies and guard confidential information. Keele legally gained possession of the firearm on behalf of a client prior to his struggles with addiction; therefore, the nexus linking his criminal conduct to his fitness to practice law is tenuousl."); In re Disciplinary Proceedings Against Brandt, 317 Wis. 2d 266, 766

In State ex rel. Oklahoma Bar Ass'n v. Smith, 246 P.3d 1090, 1096-1097 (Okla. 2011), the court imposed only public censure, coupled with one-year deferred suspension from the practice of law with probationary conditions, arising from an attorney's arrest for felony offense of attempting to obtain a controlled substance by forgery or fraud, coupled with her relapses following inpatient drug treatment program, stating that:

N.W.2d 194 (2009)(public reprimand for attorney with five drunk driving convictions); State ex rel. Counsel for Discipline of Nebraska Supreme Court v. Hubbard, 276 Neb. 741, 757 N.W.2d 375 (2008)(nine-month suspension and five years' probation where attorney gave money to an escort and paid for her car insurance, cellular telephone, and clothes while she was seeing him and was providing him with crack cocaine, and it could reasonably be inferred that the money given by the attorney to the escort contributed to their illegal use of cocaine); Iowa Supreme Court Attorney Disciplinary Bd. v. Weaver, 750 N.W.2d 71 (Iowa 2008)(three-month suspension where attorney drove a vehicle after a morning of clearly excessive drinking, nearly caused an accident, disputed any responsibility for the near collision, repeatedly denied any drinking, tried to wheedle his way out of an arrest, and falsely stated to a news reproter that the sentencing judge canceled a hearing scheduled on attorney's motion to reconsider sentence in response to receiving attorney's alcoholism treatment records); In re Rhoad, 375 S.C. 403, 653 S.E.2d 263 (2007)(90-day suspension for attorney arrested for possession of cocaine and who encouraged his wife and staff to mislead clients regarding whereabouts while he was undergoing inpatient treatment for addiction); In re Green, 371 S.C. 506, 640 S.E.2d 463 (2007)(six-month suspension following attorney's criminal convictions for driving under the influence of methamphetamine and disorderly conduct, and his arrest for driving under the influence of drugs and possession of methamphetamine); Iowa Supreme Court Bd. Of Professional Ethics And Conduct v. Sloan, 692 N.W.2d 831 (Iowa 2005)(three-month suspension for attorney convicted of serious misdemeanor possession of crack cocaine and simple misdemeanor possession of drug paraphernalia); State ex rel. Counsel for Discipline, Nebraska Supreme Court v. Hughes, 268 Neb. 668, 686 N.W.2d 588 (2004)(six-month suspension for attorney's conviction of forging prescriptions to obtain controlled substance); Matter of McEnaney, 718 A.2d 920 (R.I. 1998)(attorney's misconduct in possessing unlawful narcotics warranted 30-day suspension from practice of law, with additional condition that attorney provide disciplinary counsel with results of monthly drug-screening tests for period of time during which he remained on probation); Matter of Epps, 148 N.J. 83, 689 A.2d 726 (1997)(conviction for possession of cocaine warranted suspension from practice of law for period of three months); Matter of Pepe, 140 N.J. 561, 659 A.2d 1379 (1995)(use of marijuana by attorney and sharing it with others warrants three-months suspension from the practice of law).

While discipline should be administered fairly and evenhandedly, the terms will vary since each situation must be decided case by case, each involving different offenses and different mitigating circumstances. State ex rel. Oklahoma Bar Ass'n v. Burns, 2006 OK 75, ¶ 26, 145 P.3d 1088. Because of these differences, the range of discipline imposed in substance-related disciplinary matters has been quite wide. In the cases discussed above, public censure plus probation was deemed appropriate discipline for misconduct where the attorney's ability to practice law was not impaired, no clients were harmed, no allegations of fraud or misrepresentation were made and the lawyer maintained a strong commitment to sobriety.

We must fashion discipline that will sufficiently deter the respondent and other members of the bar from similar misconduct. The respondent in the case at bar committed the criminal offense of attempting to obtain a controlled dangerous substance by forgery or fraud. This is serious misconduct and it is not to be taken lightly. The respondent also had obtained drugs by forged prescription in the weeks prior to her arrest. The respondent has not been charged with or convicted of any crime nor has she any previous disciplinary history. Counsel for the Bar admitted that the Bar might never have learned of respondent's conduct if she had not reported herself. Thus, the respondent put herself in the position of being investigated by the Bar and subjecting herself to professional discipline when she might have avoided it by being less forthright.

Counsel for the Bar told the PRT that the respondent cooperated fully and frankly with the Bar and had done everything she could do to address her problem and facilitate her recovery. No clients were involved or harmed. We agree with the Bar that the evidence overwhelmingly demonstrates that respondent's problems were a result of her addiction to highly addictive pain medication. The respondent's conduct in confronting her addiction and seeking treatment, her self-reporting to the Bar and her forthrightness and cooperation throughout the disciplinary process serves as an example to other lawyers who are addicted. As in Donnelly, this Court will, where appropriate, look favorably on those who are self-motivated to confront their addictions, exhibit a sincere

> commitment to rehabilitation, openly admit their conduct and seek help before disciplinary charges are filed.
>
> Respondent has agreed to a one-year deferred suspension and compliance with ten probationary conditions. Based on the particular facts and circumstances of this case, we determine that public censure coupled with a deferred suspension of one year, subject to the agreed probationary conditions, is appropriate to serve as a deterrent and to encourage a permanent change of lifestyle. Accordingly, the respondent stands publicly reprimanded and is placed under deferred suspension with probationary conditions for one year from the date of this opinion.

(footnote omitted).[17]

In In re Bertucci, 990 So.2d 1275, 1278 (La. 2008), the court held that a two-year suspension should be deferred in its entirety and the attorney placed on probation where he had been found in unlawful possession of drugs and drug paraphernalia, stating as follows:

> Respondent's conduct was knowing and violated duties owed to the public. However, his conduct stemmed from substance dependence which he has worked to overcome. By all accounts, respondent's efforts have been successful thus far. Moreover, as the hearing committee pointed out, respondent's clients were not harmed by his wrongful conduct, and he has an unblemished record consisting of many years of practice as a competent and well respected criminal defense attorney.

[17] See also State ex rel. Oklahoma Bar Ass'n v. Garrett, 127 P.3d 600 (Okl. 2005)(public censure and one year probation for attorney charged with felonious sexual battery while intoxicated resulting in guilty plea to battery); State ex rel. Oklahoma Bar Ass'n v. McBride, 175 P.3d 379 (Okl. 2007)(public censure and two years' probationary suspension for attorney convicted of DUI and multiple alcohol-reated offenses); In re Smith, 290 Kan. 738, 233 P.3d 737 (2010)(one year probationary suspension for attorney convicted arising from consuming alcohol on his way to the airport, continuing to consume alcohol on the plane, being disruptive on the plane, being arrested after the plane landed, and later entering a plea of guilty to public intoxication and disorderly conduct based on attorney's conduct on the plane).

> Under the unique circumstances of this case, we conclude that the sanction recommended by the disciplinary board is appropriate. Accordingly, we will suspend respondent from the practice of law for two years. We will defer the suspension and place respondent on unsupervised probation for two years, subject to the conditions recommended by the hearing committee. Any failure of respondent to comply with the conditions of probation, or any misconduct during the probationary period, may be grounds for making the deferred suspension executory, or imposing additional discipline, as appropriate.

In In re Disciplinary Action Against O'Donnell, 747 N.W.2d 504, 506 (N.D. 2008), the court similarly imposed a two-year suspension, stayed upon certain conditions, following an attorney's conviction for attempting to acquire prescription pain medication by intentionally altering a prescription to obtain more pills than had been prescribed while he was under the influence of the same medication and in giving false information to the police officer who arrested him, stating as follows:

> On September 24, 2007, O'Donnell filed an Answer to Petition for Discipline admitting that he attempted to acquire hydrocodone by intentionally altering the prescription to obtain more pills than had been prescribed while he was under the influence of the same medication. O'Donnell also admitted that he falsely informed the arresting officer about the forgery of the prescription, but denied that he stated someone else entered his car and changed the prescription. O'Donnell further admitted he committed a criminal act; that he has completed a chemical dependency program and continues to participate in meetings and treatment; and that he is participating in the Lawyer Assistance Program. O'Donnell also acknowledged that he understands the gravity of the situation; however, he denied that his actions fraudulently affected a client or adversely affected his trustworthiness as a

lawyer and were the result of addiction, which he is addressing.[18]

Mr. Alderman respectfully submits that his circumstances are similar to the circumstances in Smith, Bertucci, O'Donnell, and other cases, and warrant similar disciplinary treatment.

Mr. Alderman's wife testified, "He did everything he could to get to where he is right now, where he has been sober for almost two years." Tr. at 33. She further

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[18] Cleveland Metro. Bar Assn. v. McFaul, 120 Ohio St. 3d 293, 898 N.E.2d 585 (2008)(two-year suspension stayed on stringent conditions for attoreny's recovery from drug or alcohol dependence arising from proceedings where attorney who took liberties on sign-in sheets at a juvenile detention center to gain access for a client's girlfriend, and was convicted of attempted drug possession.); Disciplinary Counsel v. Scacchetti, 114 Ohio St. 3d 36, 867 N.E.2d 830 (2007)(18 months of 24-month suspension stayed upon compliance with conditions where attorney entered guilty plea to charge of cocaine possession; initially entered into a rehabiliation program; suffered a relapse; served one week in jail; and entered into another rehabilitation program); Disciplinary Counsel v. Wolf, 110 Ohio St. 3d 411, 853 N.E.2d 1169 (2006)(two-year suspension stayed where an attorney's addiction to painkilling medication and a relapse after an earlier recovery resulted in two felony convictions for procuring dangerous prescription drugs by deception because court concluded she had proved renewed commitment to and reliable success in recovery); Disciplinary Counsel v. May, 106 Ohio St. 3d 385, 835 N.E.2d 372 (2005)(two-year suspension stayed on conditions imposed when an attorney's addiction to a painkilling prescription drug resulted in his being charged with two felonies for obtaining a dangerous drug by deception and his treatment in lieu of conviction); In re Kummerer, 714 N.E.2d 653 (Ind. 1999)(six-month suspension from practice of law, with first thirty days to be served as active suspension and the balance conditionally stayed subject to the completion of one-year period of probation, was appropriate sanction for attorney who engaged in misconduct by purchasing and possessing cocaine, where attorney cooperated in disciplinary proceedings and had no prior disciplinary record in 25 years of practice, misconduct did not relate directly to his practice, possession of cocaine was result of a single act of bad judgment, and attorney had since submitted to over 100 supervised random drug screens and tested negative each time); Matter of Gooding, 260 Kan. 199, 917 P.2d 414 (1996)(attorney's conduct in using alcohol and cocaine over course of ten years deemed to have warranted discipline of two years of probation, where attorney was not convicted of felony violation for use of drugs, he was free of substance abuse since his arrest nearly seven years earlier, his recovery from chemical dependency and mental disability was demonstrated by meaningful and sustained period of successful rehabilitation, he showed continued commitment to treatment through professional counseling, alcoholics anonymous, and cocaine anonymous groups, he suffered from chemical dependency at time of his infractions, he received punishment by reason of his incarceration for about one year, he had no prior disciplinary problems, and many persons attested to his good reputation).

testified, "His participation is very strong in AA and NA. He goes to meetings every day. Many times he'll go to two meetings a day. He talks recovery with people. He has already helped three, four, five people with their addictions. . . . He is very active in the groups. Very active, very dedicated." Id. at 34.

After hearing all Mr. Alderman and his family had endured in order for him to get the treatment he needed, one of the Hearing Panel Subcommittee members remarked, "I'm amazed. I don't know how you as a family would be able do do that for that long, frankly, and stick together like you have. But part of this, it would be important for you and your children that he be able to maintain his license to support the kids, correct?" Id. at 59.[19]

Another member of the recovery community testified regarding Mr. Alderman's efforts to assist others: "John has not only maintained his, but he's helped improve my sobriety. He's at meetings daily. He interacts with others. I know he sponsors other people, which is where we take new people and we help – we help them engage in the 12 steps of recovery." Id. at 70.

George Daugherty, an attorney and original member of what was then known as the Impaired Lawyers Committee, testified extensively about Mr. Alderman's progress and contributions to assist others with their battle with addiction. He observed, "John has astounded me in reality. . . . the whole idea of taking the time off and going

[19] Mr. Alderman's wife answered in the affirmative. Id. In addition to the significantly detrimental impact on Mr. Alderman's family if he is unable to continue to engage in the practice of law after a period of over a year in which he was actively in treatment, the Hearing Panel Subcommittee properly took into account the potentially detrimental impact of any suspension on Mr. Alderman's clients.

down to Nashville and working with others and really devoting not only his time, but his efforts and his money and going way beyond the call of duty." Id. at 92-93. Mr. Daugherty testified, "I think his record of trying to get and keep himself in recovery is probably unparalleled in my experience. . . . He has been an inspiration to me." Id. at 93.

As noted by the Office of Disciplinary Counsel in its brief, there has never been any complaint against Mr. Alderman by a client; there has never been any allegation against Mr. Alderman for the misuse or mishandling of client funds; Mr. Alderman fully cooperated in this investigation; Mr. Alderman's addiction to prescription medications arose from a medical condition that was unresolved through surgery; Mr. Alderman sought treatment for his addiction to prescription medications prior to his first arrest; Mr. Alderman's use of illegal drugs grew out of his addiction to prescription medications and the failure of treatment; Mr. Alderman immediately sought additional treatment after his first arrest and ceased the practice of law; Mr. Alderman second arrest occurred within a few weeks of his release from treatment after he suffered a relapse; Mr. Alderman then immediately sought treatment for essentially a year on both an inpatient and outpatient basis; Mr. Alderman has maintained his sobriety since August 2009; Mr. Alderman resumed the practice of law in October 2010 as a solo practitioner, represents dozens of clients in a variety of matters, and several of his clients testified glowingly about the representation he has provided; and Mr. Alderman has been actively involved in the recovery community, assisting addicts, their families, and local law enforcement in dealing with substance abuse.

Accordingly, the circumstances of this case support a two-year suspension with credit for one year in which Mr. Alderman was in a rehabilitation program, was not practicing law, and maintained his sobriety, and with the second year held in abeyance for a period of two years while Mr. Alderman is supervised in his practice by a competent local attorney, with quarterly reports to the Office of Disciplinary Counsel;

IV. CONCLUSION

The respondent, John W. Alderman, III, respectfully requests that this Court adopt the recommendations of the Office of Lawyer Disciplinary Counsel and the Hearing Panel Subcommittee of the Lawyer Disciplinary Board.

JOHN W. ALDERMAN, III

By Counsel

Anci G. Ramey, Esq.
WV Bar No. 3013
Steptoe & Johnson PLLC
P.O. Box 2195
Huntington, WV 25722-2195
Telephone (304) 526-8133

CERTIFICATE OF SERVICE

I, Ancil G. Ramey, Esq., do hereby certify that on April 16, 2012, I served the foregoing "Brief of Respondent" by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

Rachael L. Fletcher Cipoletti, Esq.
Chief Lawyer Disciplinary Counsel
Office of Lawyer Disciplinary Counsel
2008 Kanawha Boulevard, East
Charleston, WV 25311

Ancil G. Ramey, Esq.
WV Bar No. 3013